

Jury Damage Awards in Times of Recession

By Edie Greene

These are no ordinary times. Unemployment figures continue to creep upward; more Americans are receiving food stamps than ever before; the manufacturing and construction sectors, real estate values, retirement accounts, and investment savings have all gone south. In the largest industrial bankruptcy in U.S. history, the federal government is now the majority stakeholder of General Motors.

Yet in the midst of this upheaval, plaintiffs continue to file lawsuits, cases continue to work their way through the civil justice system, and jurors continue to assess what money, if any, some of those plaintiffs should receive to compensate them for apparent injuries and losses. So isn't it inevitable that our vast economic woes will trickle down to jury deliberation rooms across the country, affecting how jurors perceive plaintiffs and defendants and influencing the ways they transfer money between the two? In a word, no.

Despite the apparent certainty expressed by some commentators (e.g., Baldas, 2009), I suggest that we have little data at this point to support any firm conclusions related to the effects of the 2008-2009 recession on jury decisions regarding damages. Instead, we have commentators' beliefs and suspicions—some of them contradictory and few, if any, of them informed by research findings. But we also have a wealth of information, based on empirical data, about how jurors think about plaintiffs, civil defendants (primarily corporations), and damage awards in more flush times. And while it is worth pondering how jurors' judgments might be influenced by an ailing economy, we should do so in light of what we already know about the processes by which most juries make damage awards. In the sections that follow, I will share what lawyers and commentators are saying about the effects of the recession on jury damage awards, point out some contradictions in their forecasts, and place the discussion in the context of what research studies say about how jurors make damage awards.

What commentators surmise about the recession's impact on damage awards

The recession is good for plaintiffs

Without a doubt, Americans are angry about the role played by large corporations generally, and financial institutions in particular, in fueling the recession. According to an ABC News/Washington Post poll of 1000 adults conducted in late March of 2009, approximately 2/3 of respondents said so (Washington Post-ABC News, 2009). Three-quarters of respondents said they were angry about the levels of compensation paid to top corporate executives and four-fifths expressed anger about large bonuses paid to employees of companies that have accepted government loans. Fewer than 1 in 5 respondents said they had a positive opinion of executives at the major U.S. automotive companies. I can discern three reasons that corporate defendants expect this anger to work against them: 1) because it translates into rampant anti-corporate sentiment; 2) because some jurors will have lost jobs; and 3) because working people may want to send a message to "corporate America."

The climate seems ripe for anti-corporate sentiment. Indeed, much of the speculation about jurors' attitudes reflects this belief. According to corporate defense attorney Michael Jones, "[a]ny company heading to trial needs a strategy for dealing with juror anger." Jones further alleges that juror anger knows no boundaries: "When it comes to anger and fear, no group of jurors is exempt. White-collar workers are just as angry as blue-collar workers. They have also suffered greatly in this economy, and they also blame corporate greed. In some ways, newly disillusioned white-collar workers may be more dangerous than jurors who are constitutionally anti-corporation because the former are harder to

spot in voir dire and stronger advocates against the corporation in the jury room” (Jones, 2009). On his blog, *george’s employment blawg*, commentator George Lenard wrote that because we are experiencing a “much-publicized economic crisis in which many corporate leaders, particularly in the financial sector, have been blamed [and] even vilified...many jurors will tend to view businesses and their leaders as perpetrators, not victims, of the nation’s economic hardships” (Lenard, 2009). Viewing corporate executives as perpetrators does not bode well for defendants.

The fact that many Americans have lost their jobs is, according to Lenard, another reason that corporate defendants, particularly those who face inner-city juries, should be worried. He reasons that a “jury of 12 is likely to have at least one unemployed member and one or more who are underemployed or ‘discouraged workers’ not counted in the unemployment rate because they are not looking for work. The more the jury pool draws from inner cities or other higher-unemployment areas, the wors[e] this effect is likely to be...I would expect economic circumstances to generally favor employees in employment jury trials” (Lenard, 2009).



Jurors’ apparent desire to punish corporations also concerns the defense bar. According to Andrea Johnson of the energy law firm, Burleson Cooke, jurors already skeptical about the integrity and decision making of corporate managers may “drive home a point through verdicts with large punitives” (Baldas, 2009). Keith McMurdy, an attorney who defends employers in wrongful discharge and discrimination cases, put it more succinctly: “I think juries are just going to hammer us” (Baldas, 2009).

The recession is good for defendants

But not all commentators see it that way. Some believe that jurors may actually be *more* sympathetic to corporate employers in hard economic times. Mara Levin, a management-side attorney, suggests that jurors “bring to deliberations their life experiences. In this economy, that means that they’re acutely aware of how badly companies are suffering—some on the brink of shutting down” (Baldas, 2009). And though jurors may not feel much sympathy for corporate executives, they may also not want to hurt business defendants financially for fear of further job losses.

Even the news about growing unemployment and its related hardships may soften jurors to corporate defendants. At least in the context of employment disputes, the more that jurors hear about layoffs and terminations, the more commonplace they seem, and the less likely jurors are to view them as suspicious or wrongful. But more broadly, jurors probably understand that as corporations are made to pay more in damage awards, at least some of their workers are likely to suffer.

According to commentators, there is yet another reason that corporate defendants may be able to weather recession-related legal conflicts. When all Americans are affected, at some level, by economic hardships, jurors may distrust the motives of plaintiffs, especially those whose injuries and losses are not catastrophic. Why, jurors might reason, should they enhance the standing of a few plaintiffs when other people continue to suffer financially? In fact, jurors who have recently lost jobs may be especially hard on plaintiffs. Although these sentiments may have minimal impact on awards for economic damages, they could affect thoughts about compensation for noneconomic injuries (so-called “pain and suffering”) and punitive damages (Lenard, 2009).

Obviously then, there are conflicting beliefs and speculations about the recession’s impact on jury damage awards. Recession-related anti-corporate sentiments may work *in favor of* plaintiffs, making it easier for them to prevail and

win sizeable damage awards but concerns about further layoffs and windfall profits may work *against* plaintiffs. Until we can learn—through juror interviews, simulation studies, or Verdict Reporters—about the *actual* impact of these trying economic times on damage awards, I suggest another approach. I propose that we take account of what we already know about how jurors' attitudes toward plaintiffs and corporate defendants shape their judgments about damage awards. This scientific literature should provide a starting point for ongoing evaluations of the recession's impact.

What we know about jurors' thoughts on damage awards

Skepticism about plaintiffs

Despite rhetoric and supposition that juries are biased in favor of plaintiffs and freely dole out large damage awards for trivial losses, verdict data, juror interviews, and simulation studies suggest quite the opposite. In the most recent large-scale study of jury verdicts in civil trials, the Bureau of Justice Statistics reported that plaintiffs won only slightly more than half the time in state courts in 2005 (Langton & Cohen, 2008). The median compensatory damage award was only \$28,000 (with half the awards below that amount); fewer than 14% of winning plaintiffs received more than \$250,000 in damages; and fewer than 5% received more than \$1 million. Only approximately 5% of winning plaintiffs were awarded punitive damages and the median award was a modest \$64,000.

Interviews of jurors who served in civil cases involving business and corporate defendants also provide evidence that jurors are not overly sympathetic toward plaintiffs (Hans & Lofquist, 1992). Jurors reported that during deliberations they carefully scrutinized plaintiffs' motives and questioned the legitimacy of their complaints. They were especially hostile toward plaintiffs who had pre-existing medical conditions, did little to mitigate their own injuries, and did not seem to be as injured as they claimed to be. (I once worked on a case in which jurors told me they noticed that the plaintiff—a middle-aged woman who lived alone and claimed her back pain was so excruciating that she could not bend over to tie her shoes—changed the color of her toenail polish midtrial. Needless to say, they questioned the extent of her suffering.) Some jurors said they acted as a defense against illegitimate grievances and frivolous lawsuits.

Simulation studies also challenge the belief that juries are overly-sympathetic toward plaintiffs. In a study in which researchers manipulated the plaintiffs' blameworthiness in order to assess whether jurors' judgments tracked relevant legal criteria, researchers found that mock jurors held plaintiffs accountable even when their actions were legally blameless (Feigenson, Park, & Salovey, 2001). Other research has shown that mock jurors discount a compensatory damage award to a partially negligent plaintiff even when instructed to award the full damages proven and that the judge would discount the award to reflect the plaintiff's negligence. In essence, the award was "doubly discounted" (Zickafoose & Bornstein, 1999). Finally, filmed deliberations of mock jurors in a personal injury case make clear that jurors speculate about the role of insurance—of both plaintiffs' and defendants'—making certain that plaintiffs are not doubly compensated by receiving payment from their own insurance and then again from the defendant (Diamond & Vidmar, 2001; Greene, Hayman, & Motyl, 2008).

Even punitive damage awards reflect moderation on the part of most juries: punitive awards tend to be proportionate to the extent of wrongdoing (Rustad, 1998) and to the level of compensatory damages awarded. For example, analysis of Florida state court verdicts between 1989 and 1998 showed that although the ratio of punitive awards to compensatory awards varied considerably by case type (ranging from 0.1:1 in impaired driver accidents to 6.3:1 in cases involving the improper treatment of deceased people), the mean punitive damage award was only 68% of the compensatory award (Vidmar & Rose, 2001). So despite rhetoric to the contrary, most indices of damage awards suggest that they are of modest size and related to the facts in evidence. When they err, jurors hold blameless plaintiffs accountable for their

losses and, in comparative negligence cases, reduce their awards even when instructed that the judge will do so. There is little evidence that jurors and juries are overly indulgent of plaintiffs.

High expectations of defendants

According to Peter Huber, senior fellow at the Manhattan Institute, juries are committed to running a charity for plaintiffs and if they can't find a negligent defendant, they simply settle for a wealthy one (Huber, 1988). This notion is consistent with the media's rapt attention to large awards assessed against corporate defendants (e.g., \$79.5 million in punitive damages awarded to the widow of an Oregon smoker who sued Philip Morris) and their lack of attentiveness to the more common but less sensational case in which a plaintiff receives a \$15,000 award to compensate for medical expenses related to a closed-head injury.

Archival studies and simulations have both shown that jury awards *do* tend to be higher when the defendant is a corporation, as compared to an individual (Chin & Peterson, 1985; Hans & Ermann, 1989). But this effect may be wholly unrelated to the defendant's wealth. In an experiment in which the identity of the defendant in personal injury cases was varied (i.e., the defendant was described as a corporation, a wealthy individual, or a poor individual), mock jurors' damage awards were insensitive to differences in perceived defendant wealth. Although corporate defendants paid more than wealthy individuals, those wealthy individuals paid no more than poor individual defendants (MacCoun, 1996). This finding suggests that jurors may treat corporations differently because they find it easier to impose a costly sanction against an impersonal entity like a corporation and because they hold corporations to a higher standard than individuals. They expect that corporate resources—both human and capital—should allow corporations to anticipate harm and act proactively to prevent it. In essence, corporate defendants may be treated differently than individual defendants but not, apparently, because of their financial standing.

Integrating what we surmise with what we know

What we have learned about jury damage awards in recent years is that they are generally modest and reflective of the evidence presented to the jury. More severely injured plaintiffs generally receive more money than less severely injured plaintiffs and more egregious wrongdoing generally results in higher awards than less egregious wrongdoing (Greene & Bornstein, 2003). Jurors are careful not to award plaintiffs more than they rightfully deserve and not to bankrupt defendants in the process. They have high expectations of corporations.

So considering what empirical research has already shown regarding juries and damage awards, I will make some tentative predictions of my own concerning the recession's impact. I acknowledge that my predictions, too, could be wrong and look forward to seeing data on the *actual* effect of the downturn on jury decisions. But I would bet that even in the deepest recession we have experienced in generations, jurors' past priorities will hold in the vast majority of future trials. Juries will continue to scrutinize the motives of plaintiffs and the actions taken by defendants. They will continue to make crucial credibility judgments and evaluate the evidence carefully. They will continue to try mightily to understand and apply the jury instructions to the facts they believe were proven. And though there may be a few recession-related exceptions to such careful analysis (one can imagine that jurors might be biased against and harsher on defendants in the narrow set of cases that involve CEOs or CFOs of financial institutions being sued by shareholders or employees), I suspect that for most plaintiffs and defendants, what



they are experiencing in this recession regarding damage awards is very similar to what they would have experienced prior to it. The main action still happens on the witness stand; the recession is merely a backdrop.

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We asked three experienced trial consultants to respond to Edie Greene’s article on damages in times of recession. Charli Morris, Rich Matthews and Leslie Ellis offer their responses on the following pages.

Response to Jury Damage Awards in Times of Recession

By Charli Morris

Charlotte A. (Charli) Morris, M.A. (cmorris35@nc.rr.com) is a trial consultant in Raleigh, North Carolina. She has worked on criminal and civil cases since 1993.

Edie Greene does an artful and articulate job of combining recent poll results about our current economic climate with jury research on how jurors make damage awards. I agree with several of her most important conclusions:

- Lawyers on both sides of the bar are concerned that the slumping economy will hurt them.
- Calls for “tort reform” greatly exaggerate the need for limits and caps.
- More often than not jurors come down on the side of reason and moderation.

I also share her faith that future juries will continue to:

- “Scrutinize” plaintiffs and defendants closely;
- Make “crucial credibility judgments and evaluate the evidence carefully” and
- “Try mightily to understand and apply the jury instructions to the facts.”

But I disagree with the idea that there will be **no** effect on how jurors perceive plaintiffs and defendants and **no** influence on the way they transfer money between the two.

I think there are many provocative questions that tough financial times beg for our attorney-clients:

- How would things change if we actually achieve universal health care for all Americans? Won't jurors discount damage awards for future medical care if they believe (rightly or wrongly) that everyone is covered?
- Same question if we actually make college more affordable: will jurors think that anyone could go back to school and improve his earning potential if he really wanted to?
- If housing remains unaffordable for many and unemployment hovers near double-digits for more than one or two years, won't jurors' discussions about what it takes to "pick yourself up and dust yourself off" reflect the reality that there are fewer opportunities overall?
- In venues that are hardest hit – think Detroit – can jurors really ignore the elephant in the jury room? Why would they? Why should they?
- Won't Baby Boomers be thinking about the fact that many of them have seen their investments reduced by half, just a decade (or less) before they planned to retire? If our work-lives have already extended to age 72 (up from 65) isn't that likely to be reflected in the awards jurors make for future lost wages?

Given that life-changing events can and do affect decision-making in important ways, I still think that figuring out how a recession (or any other sizable societal shift) affects jury decision-making is a one-case-at-a-time proposition. There will not likely be a one-size-fits-all strategy.

- Not every community weathers a recession the same way, so focus group research in the trial venue (or a match venue) will be essential.
- Witnesses will need to be prepared to articulate damages (and opinions about damages) in a way that jurors can relate to based on their own real-world experience.
- And if everyone agrees that times are tough, we'll need to distinguish through thoughtful and strategic voir dire between the person who is more sympathetic to plaintiffs as a result and the person who is hardened by the experience.

I'm comfortable knowing that jury decision-making research gives us a solid foundation for understanding how jurors award damages. But if, in fact, this recession is second only to The Great Depression I'm not betting that we know how that plays out in the years to come.



Response to Edie Greene's Article on Damages in a Recession

By Rich Matthews

Rich Matthews (www.Juryology.com) is a senior trial consultant. He consults nationwide in all types of cases.

There is No *One* Effect the Economy (or Anything) Has on Jury Verdicts

Like Edie Greene, for the past several months I have been reading and hearing pronouncements about The Effect of The Bad Economy on Jury Verdicts – one can almost hear the capitalization in the voices. It was to be expected that the opinions would conflict, as in the old tale of blind people holding different parts of an elephant and concluding that the creature is a snake, a spear, a suitcase, an umbrella stand, and so on. Their observations are accurate as far as they go and based in truth, but based on observations that are very local and specific to their circumstances, which do not necessarily coalesce into a worthwhile generalization.

In conversations and in counsel, I have the same reactions that Ms. Greene suggests: let's start with the basic unchanging truths about how jurors reach decisions and factor in the economy as simply one more variable; and before we in Law World make any grand pronouncements about the effect of the economy on verdicts, let's see some data.

In discussions with other consultants and with attorneys, hypotheses abound. For instance, one attorney has said that after 12 months of hearing news reports of billions and trillions of dollars, laypeople are no longer shocked by large numbers and thus damage awards could go up (a hypothesis I would need to see very well tested before believing). Another trial consultant has seen juries in employment cases be more willing to make the plaintiff whole up to the time of trial but less willing to go beyond that. We have all seen juries put aside their generalized anger at “corporate America” when it comes to the possibility of assessing so large a verdict that their town's largest employer might have to lay off other workers. These localized indicators are all over the graph.

I reject the notion that there is one singular effect that the current economy has on damages verdicts. Rather, I believe that the economy has *an* effect on just about every civil verdict, but that it is not one effect that is generalizable across all litigation nor even a whole category. This is because each verdict is idiosyncratic and specific, an artifact of many variables, including: the subject of the lawsuit, the facts of the individual case, the local factors that are implicated in the trial (e.g., town's biggest employer as defendant, state of local economy), the balance of the harms that the plaintiff is proposing, the performance of the attorneys involved, and the actual jurors who get selected.



Certainly, this highlights the need for trial counsel to do adequate and valid research in advance of the trial (with a trial consultant, not the “we can use the barn and my mom can make the costumes” variety) to discern what effect the national and local economic conditions have on the individual case, and thus learn how to select jurors and present the case to maximum advantage.

But the entire notion that any one factor has an effect that is both discernible and generalizable across the country or across subjects is, I believe, folly. Yes, the effect is real; no, the effect is not unified or constant.

Response to Edie Greene’s “Jury Damage Awards in Times of Recession”

by Leslie Ellis

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There have been numerous predictions about how the current economic woes will impact jury decision-making, but as Dr. Greene points out, they have all been based on supposition and anecdotes. The author reminds us of the key finding that we as jury consultants see over and over again – juries base their verdicts largely on their interpretations of the evidence and not on atmospherics. The best predictors of how closely their verdicts track the evidence are: a) how well they can understand, and therefore use, the information they are given during trial, and b) how credible and reliable they deem that information to be.

Both of those issues are already a large focus of trial preparation, and the big take away from Greene’s article seems to be “Keep doing what you’re doing.” Both plaintiff and defense counsel still need to be concerned about whether jurors will hold their clients to unreasonably high standards of behavior. Jurors may be tough on plaintiffs and corporations, but they’ve always been tough on plaintiffs and corporations. The question is whether they will be tougher than they were before and on whom, and that is yet to be seen.

Two extralegal factors that are particularly relevant to the impact of the economy on damage awards, and were the focus on many of the quoted comments, are sympathy with the plaintiff and anger at the defendant. Sympathy with a plaintiff is more closely tied to compensatory damages and jurors are less sympathetic with plaintiffs who contributed to or did nothing to mitigate their own predicament, even if the plaintiff did nothing to directly cause his or her own injuries. Anger with a defendant is more closely tied to punitive damages, and jurors get angry with defendants who were aware of a potential danger or risk and chose not to do anything about it (Hans, 2000), even if the defendant’s decision may not be seen as violating the law.

As before, counsel will need to differentiate their client from “the rest” – either the rest of the greedy, windfall-seeking plaintiffs or the rest of the greedy, evil corporations that brought down our mighty economy. And as before, it should not be done explicitly. Rather, offer whatever evidence is available to emphasize the merits of the plaintiff’s claims. Additionally, we know that jurors focus on components of damage awards and can reduce overall awards by picking apart their various components (Greene & Bornstein, 2003). Plaintiff counsel should offer as much concrete support as possible for damage demands. This will also reduce the likelihood that jurors will see the plaintiff as looking for a lottery jackpot.

Similarly, defense counsel should focus on what the defendant(s) did rather than what they did not do. Concretize the efforts the defendant made to meet and exceed the standards he or she was supposed to meet. Let jurors know this was one company that was not looking for the easy way out. If the company has a solid and well-documented history of philanthropy, mention it but don’t focus on it.

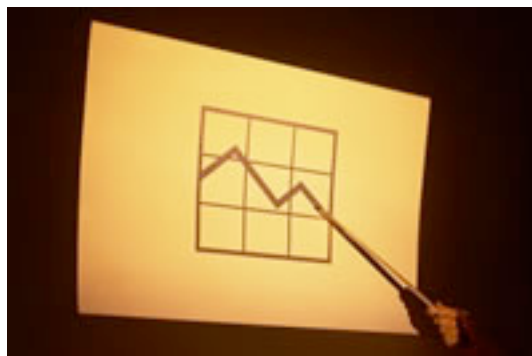
Another lesson to continue to follow is not to pander to the jury. Jurors know when counsel has made assumptions about them, and they usually bristle under such assumptions. Jurors also know when counsel is trying to speak directly to them as individuals (e.g., using analogies that relate to, or explicitly mentioning, a specific juror’s job), and it makes them very uncomfortable. Assuming that individual jurors will be less sympathetic with plaintiffs or more judgmental toward corporate defendants is dangerous business.

However, we do know that jurors' personal experiences influence how they interpret evidence, and everyone has their own life experiences upon which they rely. We also know that the economic downturn has affected some areas more than others. Judges are readily granting hardship excuses for jurors who are job hunting. Additionally, some have speculated that economic hardships will reduce minority representation on juries. These factors can all influence who shows up for jury duty, as well as who will survive cause challenges and hardship excuses. And while we cannot safely make assumptions about the impact of the economy on damage awards, *voir dire* is still the best way to protect litigants from individual biases against plaintiffs or corporate defendants. *Voir dire* or juror questionnaires should also be expanded to include specific questions about how changes in the economy have impacted jurors and whether these changes cause jurors to feel resentful towards any of the parties.

One researcher has collected data on citizens' experiences with the economic downturn and their opinions of damage awards (Cinquino, 2009) that can begin to shed some light on the topic but that also illuminate the need for more data. In a survey of jury-eligible, venue-matched citizens in various parts of the West, South, Northeast, and Midwest, she found that slightly more than half of the survey respondents felt that their economic situation stayed the same over the past year and were positive about their financial future. And while 75 percent of respondents agreed the economy will get worse before it gets better, 57 percent also agreed that it will get better sooner rather than later.



The most interesting data in the survey came from a comparison of opinions of damage awards in 2005 to the same opinion in 2009. In 2005, 5 percent of respondents believed damage awards were too low, while 41 percent said they were too high. However, in 2009, 20 percent said damage awards were too low and 28 percent said they were too high. The survey does not allow us to understand which awards were too low (i.e., compensatory or punitive damage awards), why more people now believe they are too low, or how this would impact their actual behaviors were they to serve on a jury. The data simply indicate a shift in opinion about whether damage awards are generally appropriate. One reason may be that jurors are upset at defendants and want them to pay. Another reason may be that, after constantly hearing about numbers like \$700 billion and \$1 trillion in the news, people have become desensitized to large numbers. As Dr. Greene points out, we simply don't know yet. Only time, data, and trials will tell.



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13,450+

13,450. That's the number of reads our May issue of *The Jury Expert* had as of Monday, July 20 (the day before we published this issue). Our online debut issue (in May 2008) had a few more than 500 reads. Over the past year we have grown a lot and we are grateful to the thousands of you who read our pages every issue. And even more grateful (dizzily so!) when you pass us on to your friends and colleagues.

We are also grateful to the academics and researchers who write for us and turn theory into practice and especially grateful to the members of the American Society of Trial Consultants (ASTC) without whom we would not exist. ASTC member trial consultants continue to inform, educate and surprise us with creative and practical articles focused on improving litigation advocacy. So thanks to all of you and to paraphrase a young Sally Fields--"you like us, really like us".

This issue is filled with lessons for uncertain times. We have articles on terror management theory and how to use it at trial, two articles on damages in times of recession (does it make a difference in awards and if so, how?), getting the most out of videos at trial, exploring the TODDI defense (this other dude did it!), how to prepare your witness for the environment change from office to actual courtroom, and negotiating in the new millennium. Plus our July favorite thing and a book review. It's hot outside! Stay inside, enjoy the air conditioning and read *The Jury Expert*!

--- *Rita R. Handrich, Ph.D.*



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